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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 176

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, APPELLANT,

vs.

ROY C. WALLACE, COMPTROLLER OF THE TREASURY OF THE STATE OF TENNESSEE, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

FILED JUNE 24, 1932

(36,873)

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United States, in that Tennessee's system of taxation of railroads as compared with its taxation of competing common carriers by motor vehicle is palpably arbitrary and unreasonably discriminatory, all of which is fully apparent in the record and proceedings in said cause and specifically set forth in the assignment of errors filed herein.

Wherefore The Nashville, Chattanooga & St. Louis Railway, appellant, prays that upon execution by it of a proper bond, duly and legally approved, appeal may be granted in its behalf in said cause to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said the Supreme Court of the United States at Washington.

This June 21, 1932.

The Nashville, Chattanooga & St. Louis Railway, by Fitzgerald Hall, Vice-President & General Counsel.

Appeal is hereby allowed as prayed upon The Nashville, Chattanooga & St. Louis Railway making bond as required by law in the sum of Twenty-Five Hundred Dollars.

This June 21, 1932.

Grafton Green, Chief Justice of the Supreme Court of the State of Tennessee.

[fol. 5] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 21, 1932

The Nashville, Chattanooga & St. Louis Railway, appellant in this cause, in connection with its petition for an appeal this day filed, to wit, June 21, 1932, shows the following errors which it avers occurred in the proceedings in this cause and on the trial thereof and in the opinion and judgment of the Supreme Court of the State of Tennes-

see and upon which it relies to reverse said judgment entered herein as appears of record.

I

The Supreme Court of the State of Tennessee erred in holding that Chapter 58 of the 1923 Acts of Tennessee, as amended, the caption of said chapter 58 of the 1923 Acts of Tennessee, and the caption of its principal and only relevant amendment, to wit, Chapter 67 of the 1925 Public Acts of Tennessee, being respectively in words and figures as follows:

"An act requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State."

[fol. 6] "An act to amend an act entitled: 'An Act requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State,' being Chapter 58 of the Public Acts of 1923, so as to amend the caption by including the words, 'or storing or distributing' after the word 'selling' in the third line of the caption of the printed Act as published, and by amending the body of the Act by imposing the tax upon persons, firms, associations, joint stock companies, syndicates and corporations storing or distributing any of the products mentioned in said Act."

is constitutional, first, because said act, as amended, directly and unreasonably burdens interstate commerce contrary to the "commerce clause" of the Federal Constitution (Paragraph 3 of Section 8 of Article I of the Consti-

tution of the United States), in that it imposes upon appellant, an interstate common carrier by railroad, a tax for "carrying on the business in this State of selling, storing and distributing gasoline * * *," when all appellant does is to use gasoline as it uses many other commodities in the direct and essential operation of interstate commerce by railroad; and, second, because said statute, as amended, is an integral part of Tennessee's system of taxation of railroads, which as compared to the system adopted and enforced on appellant's competitors, common carriers by motor vehicle, is so palpably arbitrary and so unreasonably discriminatory as to violate the "due process" and "equality" clauses of the Fourteenth Amendment to the Constitution of the United States.

II

The Supreme Court of the State of Tennessee erred in overruling appellant's first assignment of error in that court, which was in words and figures as follows: "The court erred in dismissing the Railway's bill."

[fol. 7]

III

The Supreme Court of the State of Tennessee erred in overruling appellant's third assignment of error in that court, which was in words and figures as follows:

"The court erred in holding that Chapter 58 of the 1923 Acts of Tennessee, as amended, was valid as to The Nashville, Chattanooga & St. Louis Railway and that said Railway had to conform thereto just as those who are in fact engaged in the business of selling, storing and distributing gasoline."

IV

The Supreme Court of the State of Tennessee erred in overruling appellant's fourth assignment of error in that court, which was in words and figures as follows:

"The court erred in not holding that said Chapter 58 of the 1923 Acts of Tennessee, as amended, was not applicable to such an interstate railroad as The Nashville, Chattanooga & St. Louis Railway; and, further, that being applicable it was not invalid, because

(a) It imposed upon a corporation chartered only to run a railroad a privilege tax for the necessary use of one of the many commodities essential to railroad operation;

(b) It directly burdens and unreasonably discriminates against interstate commerce by railroad."

V

The Supreme Court of the State of Tennessee erred in overruling appellant's fifth assignment of error in that court, which was in words and figures as follows:

"The court erred in not holding that Tennessee's system of taxation of railroads, as compared with competing common carriers by motor vehicle, was palpably arbitrary and unreasonably discriminatory in violation of the "due process" and "equality" clauses of the Fourteenth Amendment."

For which errors the appellant, The Nashville, Chattanooga & St. Louis Railway, prays that said judgment of the Supreme Court of the State of Tennessee dated June 4, 1932, in the above cause be reversed and that the appellees be taxed with the costs.

This June 21, 1932.

[fol. 8] The Nashville, Chattanooga & St. Louis Railway, by Fitzgerald Hall, Vice-President & General Counsel.

[fols. 9 & 10] Bond on appeal for $2,500, approved and filed June 21, 1932, omitted in printing.

[fol. 11] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

ORDER ALLOWING APPEAL—Filed June 21, 1932

This cause came on to be heard upon the petition of The Nashville, Chattanooga & St. Louis Railway, appellant in this cause, for an appeal to the end that said cause may be transferred as provided by law to the Supreme Court of the United States for final determination.

And it appearing to the court that The Nashville, Chattanooga & St. Louis Railway has in proper manner challenged the constitutional validity of certain statutes of the State of Tennessee on the ground that same are repugnant to the Constitution of the United States and this court having found by opinion filed June 4, 1932, that said statutes are valid and enforceable, and applicable to the said Railway, and The Nashville, Chattanooga & St. Louis Railway having filed an appeal bond in the sum of Twenty-Five Hundred Dollars satisfactory to the Chief Justice of this court.

It is, therefore, ordered, adjudged and decreed that an appeal as prayed be and the same hereby is allowed to the Supreme Court of the United States.

It is further ordered that a transcript of the record, proceedings, papers, opinions and judgment in this cause shall be prepared, certified and transmitted by the Clerk of the Supreme Court of Tennessee to the Supreme Court of the United States at Washington in the manner provided by law, so that he shall have the same in said court within thirty [fol. 12] days of this date, to the end that said court may inspect the same and do what according to law should be done.

This the 21 day of June, 1932.

Grafton Green, Chief Justice of the Supreme Court of the State of Tennessee.

[fol. 13] Citation, in usual form, showing service on Roy H. Beeler, filed June 21, 1932, omitted in printing.

[fol. 14] IN SUPREME COURT OF TENNESSEE

ASSIGNMENTS OF ERROR

I

The Court erred in dismissing the Railway's bill. (R. 31-32.)

II

The Court erred in holding that Chapter 58 of the 1923 Acts of Tennessee, as amended, was applicable to the Nashville, Chattanooga & St. Louis Railway. (R. 31-32.)

III

The court erred in holding that Chapter 58 of the 1923 Acts of Tennessee, as amended, was valid as to The Nashville, Chattanooga & St. Louis Railway and that said Railway had to conform thereto just as those who are in fact engaged in the business of selling, storing and distributing gasoline. (R. 31-32.)

IV

The court erred in not holding that said Chapter 58 of the 1923 Acts of Tennessee, as amended, was not applicable to such an interstate railroad as The Nashville, Chattanooga & St. Louis Railway; and, further, that being applicable it was not invalid, because

(a) It imposed upon a corporation chartered only to run [fol. 15] a railroad a privilege tax for the necessary use of one of the many commodities essential to railroad operation;

(b) It directly burdens and unreasonably discriminates against interstate commerce by railroad. (R. 31-32.)

V

The court erred in not holding that Tennessee's system of taxation of railroads, as compared with competing common carriers by motor vehicle, was palpably arbitrary and unreasonably discriminatory in violation of the "due process" and "equality" clauses of the Fourteenth Amendment. (R. 31-32.)

[fol. 16] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

vs.

ROY C. WALLACE, Comptroller, et al.

Davidson Equity

OPINION—Filed April 30, 1932

The bill was filed under the declaratory judgments law to determine whether the complainant is subject to the tax

imposed by the State revenue law upon those "engaged in or carrying on the business of storing or distributing gasoline." The defendant demurred to the bill and the demurrer was sustained.

Complainant's appeal involves the application of the interstate commerce clause of the Constitution of the United States. It insists that the gasoline stored and used by it is devoted exclusively to the promotion of its business as an interstate commerce carrier.

Pending consideration of the case in this court, three judges sitting in the District Court of the United States passed upon the question in the case of American Airways, [fol. 17] Inc. v. Roy C. Wallace, Comptroller, and held that the tax applied to those storing and distributing gasoline, notwithstanding its ultimate use for the promotion of interstate commerce.

Notwithstanding a minority of the members of this Court do not concur in the reasoning and conclusion of the United States District Court, we are of the opinion that it is the duty of the court to follow the decision of the United States Court sitting in this jurisdiction, with the result that the decree of the chancellor is affirmed.

Cook, J.

[fol. 18] IN SUPREME COURT OF TENNESSEE

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

vs.

ROY C. WALLACE, Comptroller, et al.

Davidson Equity

Affirmed

DECREE—April 30, 1932

This cause came on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that the demurrer be sustained, the original bill be dismissed and that the N. C. & St. L. Ry. Co., principal and Fitzgerald Hall and Seth Walker, sureties, will pay all of the costs of this cause, for which let fi. fa. issue.

[fol. 19] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE, AT NASHVILLE

[Title omitted]

PETITION FOR REHEARING—Filed May 4, 1932

MAY IT PLEASE THE COURT: We file this petition, not to ask a rehearing on the question actually decided by this honorable Court in its decision of April 30th 1932, but to request that two vital questions raised in the original bill and in the assignments of error, brief and argument in this honorable Court be disposed of, to the end that when the case goes as is expected, to the Supreme Court of the United States all questions will have been decided by this honorable Court and all may therefore be reviewed by that Court.

I

It was set forth in detail in paragraph (a) of Section VII of the original bill that approximately forty per cent of the [fol. 20] gasoline in question was neither purchased nor consumed in Tennessee, but was temporarily located at petitioner's Nashville shops for inspection pending use by petitioner thereof in the states of Kentucky, Alabama and Georgia.

The prayer of the petition asked this honorable Court to determine whether the statutes under attack, if valid and applicable, applied to "both that actually used and consumed in railroad operations in Tennessee and that actually used and consumed in railroad operations in the states of Kentucky, Alabama and Georgia * * *." As

approximately forty per cent of the tax in question applies to gasoline never sold in Tennessee and never used in Tennessee, it is respectfully urged that it is of great importance that this honorable Court determine whether the statutes in question apply only to the gasoline which this Railway uses in Tennessee, or to that which it also uses in Kentucky, Alabama and Georgia.

This question was properly made in the original bill and was before this honorable Court on the original hearing, but it was not decided and yet it is of vital import in the permanent clarification as to the validity and construction of these statutes.

II

The opinion of this honorable Court deals solely with the [fol. 21] challenge to the statutes in question predicated on the commerce clause of the Federal Constitution.

However, the original bill, particulary in Section IX, challenged the validity of the statutes in question under the Fourteenth Amendment.

This was the basis of the fifth assignment of error in this honorable Court.

The case in the United States District Court at Nashville, to wit, American Airways, Incorporated, vs. Roy C. Wallace, Comptroller, which is the basis of the decision of this honorable Court, did not involve any such question and there was no consideration or discussion of that feature of the present case.

We set out in detail in the bill of complaint, as aforesaid, particularly in said Section IX, the facts showing what we believed to be a deliberate, material discrimination against railroads. This is one of the vital questions in the case and it was not touched upon, directly or indirectly, in the decision of this honorable Court.

These questions growing out of the taxation of gasoline are difficult and the sooner they are all decided by the Supreme Court of the United States the better we will all be able to know our exact rights and obligations.

[fol. 22] We, therefore, express the very earnest hope that this honorable Court will find it consistent to specifically pass upon the two questions hereinabove referred to, to the end that when the case goes to the Supreme Court of the United States, if it should so go, that said Court

will have before it the views of this honorable Court on all the vital questions raised.

For these reasons we respectfully ask a rehearing on these two questions.

Conformably to the rules of this honorable Court a copy of this petition has been served upon adversary counsel.

Respectfully submitted.

Seth M. Walker, Fitzgerald Hall, Attorneys for the Nashville, Chattanooga & St. L. Railway.

May 4, 1932.

[fol. 23] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

OPINION ON PETITION TO REHEAR—Filed June 4, 1932

In the memorandum opinion filed April 30, the court affirmed the decree of the chancellor in which he held defendant liable for the privilege tax imposed upon the storage of gasoline in the State. The determination rested upon the decision of the United States District Court in the cause of American Airways, Inc. v. Roy C. Wallace, Comptroller. The complainant asks a response to pretermitted assignments of error based upon other questions presented by the pleadings and stipulation of fact.

Responding to the petition for rehearing:

First. The privilege tax upon the storage of gasoline extends to the 40 per cent of gasoline distributed by complainant from its storage plant in Tennessee for use in railroad operations upon its lines in other States. This is so because as said in American Airways, Inc. v. Wallace, [fol. 24] Comptroller, the tax is upon the exercise of the privilege of storing gasoline and the tax fastens upon gasoline when stored without regard to the place of ultimate use.

Second. The tax imposed upon those storing gasoline applies to all alike. The statutes made no discrimination and

it does not therefore contravene the provisions of the Fourteenth Amendment.

A rehearing will therefore be denied.

[fol. 25] In Supreme Court of Tennessee

[Title omitted]

Order Denying Petition for Rehearing—June 4, 1932

This cause coming on further to be heard upon petition to rehear, upon consideration whereof the Court is of opinion that petition should be and it is hereby denied at the cost of petitioner, for which let fi. fa. issue.

[fol. 26] [File endorsement omitted]

[fol. 27] [Caption omitted]

In Chancery Court of Davidson County

#43885

Bill of Complaint of the

Nashville, Chattanooga & St. Louis Railway, a Tennessee Corporation, Complainant,

versus

Roy C. Wallace, Comptroller of the Treasury of the State of Tennessee; Chas. M. McCabe, Commissioner of Finance and Taxation of the State of Tennessee, and L. D. Smith, Attorney-General of the State of Tennessee, All Residents of Nashville, Davidson County, Tennessee, Defendants.

Original Bill—Filed September 29, 1931, at 11:15 A. M.

To the Honorable R. B. C. Howell, Chancellor, holding part one of the Chancery Court of Davidson County, Tennessee, at Nashville:

[fol. 28] Complainant respectfully states and shows to the Court:

I

That it is a corporation chartered by charter I of the Acts of Tennessee of 1845-1846, as a common carrier by railroad, operating lines engaged in both interstate and intrastate commerce in the States of Tennessee, Kentucky, Alabama and Georgia, having its principal office at Nashville, Davidson County, Tennessee, within the jurisdiction of this Court.

II

(a) Respondent Roy C. Wallace is the legally elected and duly qualified Comptroller of the Treasury of the State of Tennessee, is a resident of Nashville, Davidson County, Tennessee, and is being sued herein in his official capacity as Comptroller.

(b) Respondent Chas. M. McCabe is the duly appointed and qualified Commissioner of Finance and Taxation of the State of Tennessee, with powers fixed by statute, particularly sections 8 and 12 of Chapter 7 of the 1923 Acts of Tennessee; is a resident of Davidson County, within the jurisdiction of this Court, and is being sued in his official capacity as Commissioner of Finance and Taxation.

(c) Respondent L. D. Smith is the Attorney General of the State of Tennessee, and, as such, is the chief law officer [fol. 29] of the State, is a resident of Davidson County, Tennessee, within the jurisdiction of this Court, and is made a party hereto pursuant to the provisions of section 11 of Chapter 29 of the 1923 Public Acts of Tennessee, known as the "Uniform Declaratory Judgments Act" under which this suit is brought.

III

This is a suit under Chapter 29 of the 1923 Public Acts of Tennessee, officially cited as the "Uniform Declaratory Judgments Act," to determine whether complainant is legally obligated to pay a gasoline privilege tax as provided by Chapter 58 of the 1923 Acts of Tennessee, and the amendments thereof; and also to determine the construction and validity of said Tennessee statutes as applicable to the facts hereinafter stated. Complainant's rights and obligations under said statutes are now in issue as will be hereinafter more fully set forth.

IV

Respondent Roy C. Wallace, as Comptroller of the Treasury of Tennessee, is obligated and empowered to collect taxes due under said Act, by virtue of the provisions of section 9 of Chapter 58 of the 1923 Acts, as amended by Chapter 124 of the Acts of 1929. He, in his official capacity, upon advices of respondent Commissioner of Finance [fol. 30] and Taxation, Chas. M. McCabe, has called upon complainant to pay to the State of Tennessee privilege taxes alleged to be due under said Chapter 58 of the 1923 Acts of Tennessee, as amended, in the sum of Thirteen Thousand, Three Hundred Eighty-one and 23/100 ($13,381.23) Dollars.

The liability of complainant to pay this sum has been the matter of frequent conferences between representatives of the complainant and of respondents and their predecessors in office, and respondents have now determined to undertake to require complainant to pay this sum, and further sums in the future, which sums complainant claims are not legally due, and the question at issue is whether such sums are due, or not, and this calls for a construction of said statutes and of a determination of their validity, as hereinafter more fully set out.

V

(a) The caption of chapter 58 of the 1923 Acts of Tennessee is as follows:

[fol. 31] "An act requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax, for engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance o fa highway system in the State."

The object and purpose of this Act was to impose a privilege tax upon those "engaged in or carrying on the business in this State of selling gasoline," as a method of financing the highway system of Tennessee.

Complainant is not now and never has been engaged in the business of selling gasoline, nor has it at any time ever manufactured or distributed or sold gasoline in Tennessee; nor has it ever operated a gasoline business.

(b) The caption of Chapter 67 of the 1925 Public Acts of Tennessee is as follows:

"An act to amend An Act entitled 'An Act requiring all persons, firms, associations, joint stock companies, syndicates and corporations engaged in or carrying on the business in this State of selling gasoline and distillate in this State, to pay to the State Comptroller a privilege tax for [fol. 32] engaging in and carrying on such business in this State, equal to two cents per gallon of such gasoline and distillate, to be in addition to all other taxes, such fund to be used solely in the construction and maintenance of a highway system in the State,' being Chapter 58 of the Public Acts of 1923, so as to amend the caption by including the words, 'or storing or distributing' after the word 'selling' in the third line of the caption of the printed Act as published, and by amending the body of the Act by imposing the tax upon persons, firms, associations, joint stock companies, syndicates and corporations storing or distributing any of the products mentioned in said Act."

The object of this statute was to enlarge the scope of said Chapter 58 of the 1923 Public Acts so as to impose a privilege tax, not merely upon selling, but also upon "storing or distributing" gasoline.

Complainant has never stored any gasoline but buys the same only in such quantities as may be necessary for its own uses and has never distributed any gasoline except on its own property for its own immediate railroad uses.

(c) Said Chapter 58 of the 1923 Public Acts and Chapter 67 of the 1925 Public Acts have been amended several times to change the amount of tax, the methods of collection and administrative details. An accurate detailed list of all such statutes, in chronological order, is attached hereto marked [fol. 33] Exhibit 1, but not for copy. These amendatory statutes do not change the theory of said Act of 1923, as amended by said Act of 1925.

(d) None of the funds collected by the State under said Chapter 58 of the 1923 Public Acts, as amended, are used

for the benefit of the complainant, but on the contrary, as will be hereinafter shown, are used for the benefit of complainant's competitors.

VI

(a) Complainant does not now and never has sold any gasoline in the State of Tennessee or outside of the State of Tennessee, or engaged in the gasoline business.

(b) Complainant does not store gasoline for any person, firm or corporation, and has never distributed or delivered any gasoline to any person, firm or corporation.

Complainant buys all its railroad supplies through its Purchasing Agent at Nashville and most of these are delivered to the storehouse at the Nashville Shops for checking as to quality and quantity and dispensing over its system as the exigencies of railroad operation demand. It buys gasoline, not for storage, but for immediate, or substantially so, use. The normal supply on hand at any one time will last on the average about thirty days and is replenished currently as needed. Complainant in order to properly operate its railroad must keep on hand coal, gasoline, lubri- [fol. 34] cants, cross-ties and other materials for not less than thirty days' needs. All gasoline so purchased is used exclusively by complainant on its own railroad property—none is ever used on any public highway. Third parties use none of it.

(c) Complainant is not in the gasoline business in any way whatsoever, and its only use of gasoline is in exactly the same category as coal, lubricating oil and other supplies used in railroad operation.

VII

(a) Complainant buys gasoline from producers outside the state and it is delivered from time to time in interstate shipments to complainant at its storehouse at its shops in Nashville in quantities sufficient, as a rule, to care for approximately thirty days' use. After such gasoline is received through such interstate shipments, as aforesaid, approximately sixty per cent is consumed by complainant in Tennessee and approximately forty per cent is consumed by complainant in the States of Kentucky, Alabama and Georgia. None of the gasoline so purchased and received is ever

used in any vehicle on any public highway but is consumed exclusive in the operation of complainant's railroad.

(b) Complainant uses gasoline in various ways; for example, but not intended as an exclusive statement, the following:

[fol. 35] 1. On most of complainant's main line, all of which is a through highway of interstate commerce, automatic electric signals have been installed. These signals are inspected every day for efficiency and safety by specialists trained for that purpose. These signal maintainers each have several miles of track within their respective jurisdiction, and move over this track in little velocipedes or motor cars, the motive power of which is furnished through the use of gasoline purchased by complainant, as aforesaid, and dispensed as occasion requires all over its system for this purpose.

2. Complainant has all over its system section crews to inspect and maintain its track in proper condition. These men inspect the track practically every day, examine cross ties, rails, bridges and track fixtures over which trains regularly and daily move in interstate and intrastate commerce. They carry with them the usual supplies of tools and materials for such purposes. Each such section crew has jurisdiction of several miles and they move up and down the track within their allotted territory on little motor cars, the motive power of which is furnished by gasoline purchased by complainant, as aforesaid, and dispensed as occasion required by it over its system in the four states in which it operates.

3. Many parts of the tools which complainant has in its various shops, and many parts of the running equipment of complainant's locomotives, cars and coaches, must be [fol. 36] regularly cleaned, and this can best be done by the use of gasoline, and complainant uses a great deal of the gasoline purchased, as aforesaid, in cleaning its tools and equipment on its own property exclusively. Gasoline for from its Nashville shops as the operating necessities re such uses is distributed over the system by complainant from its Nashville shops as the operating necessities require.

4. Complainant has shops at many places in the four states in which it operates and some of these are quite ex-

tensive in territory. Many of the tools and materials used in repairing railroad equipment are extremely heavy and they are generally carried from place to place, within complainant's various shops, on little cars known as "mules," the motive power of which is furnished through the medium of gasoline purchased as aforesaid. None of these so-called "mules" are ever used off of complainant's private property and none of them ever get on any public highway.

5. The four examples above set out are typical but not exclusive of the uses to which complainant puts the gasoline sought to be taxed through the medium of the statutes above set out.

(c) Complainant uses some gasoline in automobiles on the public highways, but none of that gasoline is taken from the gasoline purchased as aforesaid by complainant on which the tax in question is sought to be levied. All of such gasoline not used in the direct operation of com- [fol. 37] plainant's railroad is bought from public dealers and the tax in question paid thereon.

VIII

(a) The tax authorized by said Chapter 58 of the 1923 Public Acts of Tennessee, as amended, as aforesaid, is not, so complainant is advised and avers, an ad valorem or property tax; nor is it imposed in the exercise of the police power as are inspection taxes; but is a method of financing Tennessee's highway system by requiring those who use gasoline to pay in proportion to the use of the public highways; and while this tax on its face is a privilege tax on those engaged in the business of selling, storing and distributing gasoline, said tax is, in fact, always passed on to the public and was so intended and all the various distributors, and sellers, and storers throughout the state advertise publicly, first, the actual price of the gasoline, and second, add thereto the amount of tax provided by this series of statutes. Complainant, as aforesaid, having never engaged in any business except operating its railroad and using none of the gasoline here sought to be taxed on the public highways is advised and avers that said statutes are not applicable to it, or if applicable, then they are invalid as hereinafter set forth.

(b) All of the funds collected under this series of acts commencing with said Chapter 58 of the 1923 Public Acts go exclusively to the maintenance and construction of the [fol. 38] highway system of the State. None of such taxes go into the general fund of the State and none are available for any except road or similar purposes. No part of these funds are expended for facilities which complainant can or does use. Said tax was intended to be and is in fact passed along to the users of gasoline, most of which are operators of automobiles; and the theory of said series of acts is that thus motor vehicle users pay for the highways in proportion to their respective use.

Complainant uses none of the gasoline here involved on the public highways but exclusively in the operation of its railroad on its own property, hence complainant is advised and avers, that these acts being intended to ultimately collect from road users in proportion to their use do not apply to the gasoline used by it in running its railroad on its own private property.

(c) One of the Acts of this series is Chapter 124 of the 1929 Acts which requires distributors, dealers, and/or storers to get permits before engaging in such business. Complainant has never obtained a permit; nor have the constituted authorities ever suggested that complainant get a permit. The question of complainant's liability hereunder has been the subject of frequent conferences with the administrators of these acts and the practical construction actually put on the same is that complainant need procure no such permit, thus indicating that said series of acts are not applicable to it.

[fol. 39] IX

(a) The series of acts here involved commencing with said Chapter 58 of the 1923 Acts constitutes the chief source of current revenues (except repeated bond and note issues) for the construction and maintenance of Tennessee's highway system and the theory thereof, as aforesaid, is that those using the highways shall by this system pay in proportion to their use. None of the gasoline here involved is ever used by complainant or others except on complainant's own private property in the operation of its railroad.

(b) Complainant is already the subject of gross and, it is believed, illegal discrimination under the laws of Tennessee in the matter of its taxes as compared with its competitors on the public highways. Under the Tennessee laws now in force motor carriers for hire obtain a highway bought and maintained by the State and governmental protection for approximately, on the average, five cents out of each dollar of gross revenue; while Tennessee railroads for the same thing must, on the average, pay approximately thirty-three cents out of each dollar of gross revenue. In other words, every kind of tax paid by motor carriers for hire (ad valorem, privilege, license, income, registration and gasoline) costs on the average five cents out of each dollar of gross revenue for which such motor carriers for hire receive not only governmental protection (as do all tax payers including railroads) but a highway to do business on in competition with railroads, said highway being [fol. 40] constructed and maintained by the State. To obtain the same thing railroads, on the average, as aforesaid, must pay out approximately thirty-three cents out of each dollar of gross revenue.

(c) These facts in detail were presented to the last General Assembly and other public officials, were never disputed, are well and generally known, yet the constituted authorities have been and are willing to take no action to remove this palpable and arbitrary discrimination against railroads such as complainant.

Filed herewith, marked Exhibits Numbers 2 and 3, and made a part hereof, but not for copy, are index numbers 42 and 47 of the detailed data presented by complainant to the 1931 Tennessee General Assembly and to the Interstate Commerce Commission, giving the details, completely and accurately, as to such discrimination.

(d) To require complainant (in addition to the disproportionate tax burden it now bears) to pay a tax on gasoline used solely in the operation of its railroad to help construct and maintain a highway for its competitors to use substantially free is, so complainant is advised and avers, a direct burden on interstate commerce, arbitrary discrimination against interstate commerce by railroad, so palpably arbitrary and unreasonable as to lack due pro-

cess of law, and so unreasonably discriminatory as to deny [fols. 41 & 42] complainant the equal protection of the laws.

X

Assuming, without admitting, that said chapter 58 of the 1923 Acts, and the amendments thereto, are applicable to gasoline used, as aforesaid, by complainant, then complainant is advised and avers that said Chapter 58 of the 1923 Acts, and the amendments thereto, are, as to it, and to the gasoline now sought to be taxed, null and void, for the following reasons:

(a) The General Assembly of Tennessee may impose only such taxes as are authorized by the Constitution of Tennessee and its powers in this respect are limited to sections 28, 29 and 30 of Article 2 of the Tennessee Constitution, which authorizes only three kinds of taxes, to wit, income, property or ad valorem, and privilege. Under said provisions the General Assembly of Tennessee may not constitutionally impose a tax upon the mere consumption of an article involving no use of public property as, for example, the eating of corn, the burning of coal, or the combustion of gasoline. The use by complainant of the gasoline here sought to be taxed, as above set out, is merely the consumption of gasoline as an incident to the operation of its railroad and involves no use of public property. The General Assembly of Tennessee has no constitutional power to make mere individual consumption of such a commodity the basis of a privilege tax, when disconnected with the use of public property.

[fol. 43] (b) All of said gasoline here sought to be taxed is used by complainant on its property for the operation of its interstate railroad. It is received by complainant in interstate commerce from other states at its general concentration point for materials and supplies at the Nashville shops and from that place dispensed, as occasion requires, always by complainant, and always on its own property, for use solely in the operation of complainant's railroad, all of the tracks being highways of interstate commerce and practically every train operated carries either freight, passengers, mail or express, moving in interstate commerce. The use of gasoline, as aforesaid, is indispensable to the proper and economical operation of interstate commerce; and said

statutes if applicable to gasoline so used, in effect impose a privilege tax on interstate commerce and directly burden such commerce contrary to the "commerce clause" of the Federal Constitution, hence are null and void.

(c) All of complainant's properties, lands, improvements thereon, tools, bridges and rolling stock are taxed ad valorem by the State of Tennessee, its counties, cities and special taxing districts; its franchises are so taxed; and it pays a state privilege and income tax on its intrastate operations, so that complainant as shown by said exhibits 2 and 3 already is taxed about 400 per cent more than its motor vehicle competitors. To require railroads, such as your complainant, to pay, in addition to all general taxes as aforesaid, a privilege tax for using gasoline in the operation [fol. 44] of its railroad in order to help construct and maintain highways for its competitors by motor vehicle, which are numerous and in active and successful competition with complainant on every part of its lines in Tennessee, is, so complainant is advised and avers, a direct and illegal burden on interstate commerce; arbitrary and unreasonable discrimination against railroads and against interstate commerce by railroads; and so palpably arbitrary, unreasonable and discriminatory that said chapter 58 of the 1923 Acts, and the amendments thereto, are null and void as violating the "commerce" clause of the Federal Constitution, the "law of the land" clause of the Tennessee Constitution, and the "due process" and "equality" clauses of the Fourteenth Amendment.

XII

Complainant is entirely able and willing to make any bond which to the Court seems proper pending a final decision of this cause, or is entirely willing, if that be deemed either necessary or proper, to deposit in Court, or in such bank as the Court may direct, and subject to the Court's orders, the total sum of money alleged to be due.

XIII

Complainant is advised and avers that it is entitled to file this bill in this honorable Court to have the statutes in question construed and their validity determined to the ex- [fol. 45] tent that they may be held to apply to the gasoline

used by complainant, as aforesaid, in the operation of its railroad.

Premises considered, Complainant asks leave to file this bill in this Honorable Court; that the parties named herein as respondents be made such by the service of process compelling them, and each of them to appear at an early rule day of this Court to answer this bill, but not under oath, answer under oath being expressly waived.

Complainant prays that the Court find that it does not owe the sum of money claimed by respondents, or any sum as a privilege tax under said statutes.

Complainant further prays that said Chapter 58 of the 1923 Acts of Tennessee, and the statutes amendatory thereof, be construed to determine whether they apply to such an interstate carrier as complainant, and if so, to determine their validity under the facts and circumstances as hereinbefore set out.

Complainant specifically prays that said Chapter 58 of the 1923 Public Acts, as amended, be held invalid to the extent that it may apply to gasoline used by complainant in the operation of its railroad, on the grounds and for the reasons hereinabove set forth.

Complainant further prays for such other, further and [fol. 46] general relief as it may be entitled to in the premises.

The Nashville, Chattanooga & St. Louis Railway, by J. B. Hill, President. Seth M. Walker, Fitzgerald Hall, Solicitors.

Attest:

T. A. Clarkson, Secretary. (Seal.)

I am security for all costs.

Fitzgerald Hall.

[fol. 47] *Duly sworn to by J. B. Hill. Jurat omitted in printing.*

I am security for the costs of this cause.

Seth M. Walker.

[fol. 48] EXHIBIT No. 1 TO ORIGINAL BILL

Chapter 58, Acts of Tennessee, 1923.

Amendments:

Chapter 4, Acts 1925.
Chapter 13, Acts 1925.
Chapter 19, Acts 1925.
Chapter 20, Acts 1925.
Chapter 67, Acts 1925.
Chapter 11, Acts 1929.
Chapter 27, Acts 1929.
Chapter 124, Acts 1929.
Chapter 19, Acts Extra Session 1929.
Chapter 28, Acts Extra Session 1929.
Chapter 30, Acts Extra Session 1929.
Chapter 40, Acts 1931.

[fol. 49] EXHIBIT No. 2 TO ORIGINAL BILL

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 23400

Exhibit —. Witness: Barham. Reporter —— ——.
Date: March —, 1931

Index No. 42

A Statement showing the cost of Maintenance of Way and Structures, Taxes and Interest on Way and Structures to the N., C. & St. L. Ry. for period 1921-1930, inclusive.

This statement is intended to show the proportion of each dollar earned by the N., C. & St. L., now necessarily allocated to the cost of taxes, maintenance of way and structures and interest on investment in Way and Structures. For ten years this allocation has on the average exceeded 33 cents for each dollar of revenue earned and contrasts with 5 cents of each dollar earned by truck lines expended for the items named.

(Here follows statement, side folio 50)

[fol. 50]

Years	Column 1 Average miles of road operated	Column 2 Value of way and structures of the N., C. & St. L. Ry. (See Note 1)	Column 3 Total operating revenues of the N., C. & St. L. Railway for years shown	Exp nan stru show
1921	1,258.50	$56,949,958	$20,924,602	
1922	1,258.54	57,471,229	22,353,763	
1923	1,258.49	59,662,798	24,801,787	
1924	1,258.95	60,698,623	23,601,646	
1925	1,259.04	61,873,838	24,000,050	
1926	1,259.53	63,245,757	24,023,878	
1927	1,259.78	63,789,494	22,905,626	
1928	1,259.76	64,536,300	23,335,033	
1929	1,235.26	65,234,540	23,203,724	
1930	1,203.39	66,096,005	19,317,453	
Average	1,251.12	$61,955,854	$22,846,756	

(B-243, corrected)s (Continued on page 2.)

g rev- N., C. ay for n	Column 4 Expenses for maintenance of way and structures for years shown (See Note 2)	Column 5 Taxes for year shown (See Note 3)	Column 6 Interest on value or return on investment in way and structures at 5% per annum	Column 7 Cost, total of columns 4, 5, and 6	Column 8 Cost per mile of road operated (column 7 divided by col. 1)
02	$3,201,572	$750,000	$2,847,498	$6,799,070	$5,403
63	3,481,360	620,000	2,873,561	6,974,921	5,542
87	4,554,318	901,900	2,983,140	8,439,358	6,706
46	3,736,177	851,900	3,034,931	7,623,008	6,055
50	3,656,724	959,516	3,093,692	7,709,932	6,124
78	3,680,983	1,275,000	3,162,288	8,118,271	6,445
26	3,310,422	1,160,997	3,189,475	7,660,894	6,081
33	3,319,458	1,178,923	3,226,815	7,725,196	6,132
24	2,910,609	1,281,000	3,261,727	7,453,336	6,034
53	3,111,807	967,537	3,304,800	7,384,144	6,136
56	$3,496,343	$994,677	$3,097,793	$7,588,813	$6,066

[fol. 51]

4—176

Years	Percentages of Gross Revenue or Proportion of Each Dollar Earned Expended for— Maintenance of way and structures	Taxes	Interest on investment in way and structures	Total (per cent)	Percentage or proportion of each dollar earned by bus and truck lines expended for taxes, maintenance of roadway, and interest on investment in roadway. (See Note 4)
1921	15.30	3.58	13.61	32.49	5
1922	15.57	2.77	12.85	31.19	5
1923	18.36	3.64	12.03	34.03	5
1924	15.83	3.61	12.86	32.30	5
1925	15.24	4.00	12.89	32.13	5
1926	15.32	5.31	13.16	33.79	5
1927	14.45	5.07	13.92	33.44	5
1928	14.23	5.05	13.83	33.11	5
1929	12.54	5.52	14.06	32.12	5
1930	16.11	5.01	17.11	38.23	5
Weighted average	15.30	4.35	13.56	33.21	5

NOTE 1.—The value of Way and Structures of the N., C. & St. L. Ry. is determined as follows: The cost of reproduction (new) less depreciation found by the Commission is subdivided under several headings including "Road" (accounts 1 to 44). The latter substantially represents "Way and Structures." However, it is felt that some few items under this heading should be eliminated so that a more accurate value of Way and Structures can be obtained. These items are Account Numbers: 16 (Station and Office Buildings); 17 (Roadway Building); 18 (Water Stations); 19 (Fuel Stations); 20 (Shop and Engine Houses); 22 (Storage Warehouses), and 44 (Shop Machinery).

NOTE 2.—The "expenses for Maintenance of Way and Structures" shown above includes an apportionment of 20% of General Expenses (as per the Commission's Classification of Accounts) for the years shown. In respondent's opinion this represents a proper charge to the expense of maintenance of Way and Structures.

NOTE 3.—Under the heading of "Taxes" shown above is included 1/3 of the rental paid by the N., C. & St. L. Railway to the State of Georgia for the use of the W. & A. R. R. The proportion, viz: $200,000 per year, represents respondent's opinion of a fair amount of the rental paid to be apportioned to taxes.

NOTE 4.—The per cent or proportion of each dollar earned by bus lines expended for taxes, maintenance of roadway and interest on investment in roadway is taken from "A Study of 1929 Motor Bus Operating Costs" published by the National Association of Motor Bus Operators. Similar figures, in connection with motor truck lines, are set out in detail in Statement, Index No. 43.

(B-243) (Corrected)s.

Nashville, Tenn. February 9, 1931.

[fol. 52] EXHIBIT No. 3 TO ORIGINAL BILL

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. C. C. Docket No. 23400

Exhibit —. Witness: Barham. Reporter: ——. Date: March —, 1931

Index No. 49

A comparison of property and privilege taxes paid in 1929 by the Railroads operating in 33 Tennessee Counties named, with the Amount of Taxes paid in the same counties by all motor carriers competing with Railroad carriers (gasoline tax not included).

As this exhibit shows, the total ad valorem property taxes paid by all busses and trucks competing with railroads in these 33 Tennessee Counties, in 1929, was $644.00 of which $420.00 was paid in Grundy County, all by the N., C. & St. L. which at that time operated two busses and two trucks in that County.

Registration tags are required purchased by motor vehicles, both private and public, and this item accounts for more than one-third of all the taxes paid by motor trucks and busses, excluding gasoline, the tax on which is also paid by all motorists and gasoline used industrially.

The discrepancy in the division of privilege taxes between the Counties and State on busses and trucks is explained by a provision of law which forbids county assessments for this purpose on busses, the State tax privilege being inclusive.

(Here follows statement, side folios 52½ and 53)

[fol. 52½]

County	Privilege					
	Bus		Truck		Terminal	
	County	State	County	State	County	State
Bedford			$137.50	$137.50		
Benton						
Bledsoe			22.50	30.00		
Carroll			25.00	55.00		
Cheatham		150.00	250.00	313.75		
Coffee		125.00	75.00	75.00		
Davidson	232.50	22,738.75	1,536.25	1,501.25	87.50	327.50
Decatur				11.25		
Dickson		911.25	337.50	337.50		62.50
Fayette			12.50	12.50		
Franklin	138.75	138.75	175.00	175.00		
Grundy c		1,000.00		50.00		
Hamilton		4,418.13	487.50	706.75		75.00
Hardeman						
Haywood			20.00	20.00		
Henderson	6.25	6.25	37.50	37.50		
Henry		62.50				
Hickman		100.00	87.50	158.75		
Humphreys				251.50		
Lewis			11.25	50.00		
[fol. 53]						
Lincoln	24.40	61.25	137.50	275.00		
Madison		1,800.00	152.50	152.50	12.50	37.50
Marion		764.50	35.00	35.00		
Marshall	45.00	45.00	470.00	477.50		
Maury	270.00	270.00	462.50	462.50		25.00
Obion	12.50	37.50	250.00	253.75		
Rutherford		825.00	625.00	1,537.50	231.00	30.00
Sequatchie			12.50	12.50		
Shelby		2,000.00	250.00	250.00	150.00	250.00
Warren				33.75		
Weakley		300.00	52.50	52.50		
White		12.50	12.50	27.50		
Wilson	6.25	806.25		425.35		
Total	$735.65	$36,572.63	$5,675.00	$7,918.60	$481.00	$807.50

a—Estimated.
b—Special Tax.
c—All motor tax payments in Grundy County were made by the N. C. & S
account of 2 busses and 2 trucks on short runs represents 5.25% of all paymen
NOTE.—The above figures do not include municipal taxes or taxes in speci
During 1929 the N. C. & St. L. paid municipal taxes in these counties amoun
If we may assume that approximately the same proportion obtains with other
in municipal taxes for 1929.
While no check was made of municipal taxes paid by motor carriers for hi
lected indicates that the total of such taxes was not greater than the amount
(B—221)s.
Nashville, Tenn.
January 27, 1931.

Terminal		Ad Valorem Property Tax		Registration Tags		Total		Railroads	
unty	State	County	State	County	State	County	State	County	State
...	...	...	...	...	$557.53	$137.50	$695.03	$16,223.84	$2,032
...	...	...	...	...	...	...	...	17,472.22	1,941
...	...	...	...	...	207.50	22.50	237.50	3,309.32	380
...	...	...	...	...	359.08	25.00	414.08	44,798.60	4,329
...	...	...	...	...	404.09	250.00	867.84	6,289.15	833
...	...	...	...	...	358.69	75.00	558.69	12,383.65	1,314
87.50	327.50	...	...	...	4,384.21	1,856.25	28,951.71	66,142.74	13,860
...	...	...	...	...	212.76	...	224.01	2,588.17	230
...	62.50	...	171.00	...	1,162.85	337.50	2,645.10	26,949.18	2,544
...	...	...	...	...	27.02	12.50	39.52	41,927.72	4,023
...	...	...	...	...	a800.00	313.75	1,113.75	35,606.70	4,391
...	...	390.00	30.00	...	305.00	390.00	1,385.00	10,567.26	813
...	75.00	46.20	7.00	...	3,661.44	533.70	8,868.32	138,776.84	20,320
...	...	...	...	...	...	...	...	62,079.01	6,745
...	...	...	...	...	118.17	20.00	138.17	17,271.21	2,314
...	...	...	...	...	148.99	43.75	192.74	18,999.84	1,435
...	...	...	...	...	20.25	...	82.75	38,094.26	4,008
...	...	...	...	...	520.61	87.50	779.36	12,148.22	1,038
...	...	...	...	...	636.55	...	888.05	23,180.15	1,915
...	...	...	...	...	54.17	11.25	104.17	9,191.82	902
...	...	...	...	...	695.44	161.90	1,031.69	8,826.46	1,594
12.50	37.50	...	...	...	683.76	165.00	2,673.76	72,672.07	8,809
...	...	...	...	...	99.39	35.00	898.89	22,819.35	2,330
...	...	...	...	...	628.93	515.00	1,151.43	29,917.39	3,471
...	25.00	...	...	...	1,388.97	732.50	2,146.47	36,471.28	5,405
...	...	...	...	...	494.80	262.50	786.05	67,568.06	9,178
31.00	30.00	...	...	...	3,389.69	856.00	5,782.19	27,681.31	3,542
...	...	...	...	...	160.88	12.50	173.38	3,139.73	369
50.00	250.00	...	...	...	4,068.61	400.00	6,568.61	190,784.89	39,916
...	...	...	...	b100.00	358.93	100.00	392.68	7,056.69	789
...	...	...	...	...	319.51	52.50	672.01	37,799.78	4,658
...	...	...	...	...	31.85	12.50	71.85	9,168.78	1,079
...	...	...	...	...	1,366.49	6.25	2,598.09	6,838.21	1,120
81.00	$807.50	$436.20	$208.00	$100.00	$27,626.16	$7,427.85	$73,132.89	$1,124,743.90	$157,622

by the N. C. & St. L. Motor Transit Co., a subsidiary of the N. C. & St. L. Railway. This payment on % of all payments made for county purposes, and 1.9% of all taxes paid for state purposes.
or taxes in special school drainage or improvement districts for either railroads or motor carriers for hire.
counties amounting to $105,911, this sum being 24.9 per cent of the $425,360 paid for county purposes.
tains with other railroads, it would appear that all railroads operating in these 33 counties paid $280,061

or carriers for hire, examination of the laws and ordinances under which such taxes could have been col-
an the amount paid as county taxes, viz: $7,427.85.

[fol. 54] IN CHANCERY COURT OF DAVIDSON COUNTY

SUBPŒNA TO ANSWER—Issued September 29, 1931

State of Tennessee to the Sheriff of Davidson County, Greeting:

We command you to summon Roy C. Wallace, Comptroller of the State of Tennessee; Chas. M. McCabe, Commissioner of Finance and Taxation of the State of Tennessee; L. D. Smith, Attorney General of the State of Tennessee, if to be found in your County, to appear before the Chancellor of Part One of our Chancery Court at Nashville, on the first Monday in October 1931, it being the 5th day of October 1931, there and then to answer the Original Bill of Complaint of Nashville, Chattanooga & St. Louis Railway vs. Roy C. Wallace, Comptroller etc. and others, and further do and receive what our said Court shall consider in that behalf; and this you shall in no wise omit, under the penalty prescribed by law. Herein fail not, and have you then and there this writ.

Witness Joseph R. West, Clerk and Master of our said Chancery Court at Office, in the Court house at the City of Nashville, Tennessee, this first Monday in April 1931 and the 155th year of American Independence.

Joseph R. West, Clerk and Master, by C. H. Swann, D. C. & M.

Sheriff's Return

Executed by reading the within process to L. D. Smith, Attorney General, who accepted service for all the within named defendants, and left with him a copy of this subpœna and a copy of the bill filed in this cause.

Sam J. Shryer, Sheriff, by F. J. Lawrence, D. S.

This Sept. 29, 1931.

[fol. 55] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ORDER GRANTING LEAVE TO AMEND BILL OF COMPLAINT—Nov. 11, 1931

In this cause, upon application of the complainant, it was ordered by the Court that complainant be and is hereby permitted to amend its original bill filed herein, as follows:

1. By rewriting all of Section III, on page 2 of the original bill so that as rewritten it will read as follows:

"III

This is a suit under Chapter 29 of the 1923 Public Acts of Tennessee officially cited as the 'Uniform Declaratory Judgments Act' to determine to what extent, if any, complainant is subject to the various provisions of Chapter 58 of the 1923 Acts of Tennessee and the amendments thereof; and also to construe said series of statutes to determine whether they require a railroad, such as complainant, to obtain a permit, or to make any bond or bonds, or to pay any tax on any gasoline used in railroad operations in Tennessee or elsewhere; and to determine the constitutional validity of said statutes if they be construed as [fol. 56] applicable to such a railroad as complainant under the facts hereinafter stated.

Complainant's rights and obligations under said statutes are now actually in issue as will be hereinafter more fully set forth."

2. By striking entirely from the original bill Section XII thereof at the top of page 12.

3. By changing on page 12 of the original bill Section "XIII" to Section "XII."

4. By striking out on page 12 the second paragraph of the prayer, reading as follows:

"Complainant prays that the Court find that it does not owe the sum of money claimed by respondents or any sum as a privilege tax under said statutes,"

and insert in lieu thereof the following:

"Complainant prays that the Court determine and declare whether it is obligated to obtain any permit or make any bond or comply with any of the other administrative provisions of said series of statutes; and further that the Court determine and declare whether gasoline temporarily stored in complainant's shops at Nashville, Tennessee, both that actually used and consumed in railroad operations in Tennessee and that actually used and consumed in railroad operations in the States of Kentucky, Alabama and Georgia,

comes within the purview of any of the administrative or other provisions of this series of statutes."

[fol. 57] It is further ordered by the Court that copy of these amendments be spread upon the minutes.

[fol. 58] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

DEMURRER OF DEFENDANTS—Filed November 11, 1931

Come the defendants, Roy C. Wallace, Chas. M. McCabe, and L. D. Smith, Comptroller of the Treasury, Comissioner of Finance and Taxation and Attorney General of the State of Tennessee, respectively, and move the Court to dismiss complainant's bill as amended on demurrer and as grounds for said demurrer assign the following:

I

Because under the facts as alleged in the bill filed against them in this cause, the sole and exclusive remedy, if any, available to complainant, is first, to pay the tax in question under protest and thereupon seasonably to institute suit in the proper court to recover the sum so paid, and this Honorable Court is therefore without jurisdiction in this case.

II

Under the facts set forth in complainant's bill, the com-[fol. 59] plainant is entitled to no adjudication construing the statutes in question or declaring its status, rights, obligations or liabilities thereunder, because under the law, the sole and exclusive remedy provided is for the complainant to pay the tax in question under protest and then seasonably sue in the proper court to recover same, and such procedure would afford the complainant such full, complete and adequate relief as it is entitled to under the facts and under the law, and would necessarily require of the Court a construction of the statutes involved and a declaration of the complainant's rights and status thereunder.

III

As a matter of law, the complainant is entitled to no relief under Chapter 29, Public Acts of 1923, known as the "Uniform Declaratory Judgments Act" until the tax in question has first been paid under protest and suit has been seasonably brought in the proper court to recover the same. In other words, until the tax in question has been paid, the complainant has suffered no injury and is not entitled to invoke the protection of the Court.

IV

Chapter 29, Public Acts of 1923 has no application to the state of facts set up in complainant's bill, because the only procedure provided in such cases is for the taxpayer to pay the challenged tax under protest and then bring suit in the proper court to recover the same, where all of the taxpayer's [fol. 60] rights can be adjudicated and fully protected, and this Honorable Court is therefore without jurisdiction in this case.

V

Under the law, the complainant as a taxpayer is not entitled to resort to the courts for a declaration of its rights and status and thereby hinder, hamper and delay these demurrants as officials of the State in the discharge of their official and legal duty to collect promptly the tax in question as and when due, since the statute requires the payment of the tax in order to entitle the taxpayer to question its validity or the validity of the statute imposing the same.

VI

Because under the allegations of the bill, no such state of facts is presented as would entitle the complainant to any protection or exemption under the "Commerce Clause" of the Federal Constitution. It is alleged that the gasoline is purchased outside the State and shipped to complainant's warehouse or storehouse in Nashville, Tennessee, and there stored in quantities sufficient for at least thirty days' use and that it is distributed over the complainant's railroad system as and when needed, and that approximately sixty (60%) per cent of same is consumed in Tennessee and forty

(40%) per cent in Kentucky, Alabama and Georgia. This method of handling the gasoline in question does not, as a [fol. 61] matter of law, entitle the complainant to escape payment of the tax complained of under the Commerce Clause of the Federal Constitution, nor does the imposition of the tax constitute such a burden on interstate commerce as would afford the complainant any legal grounds for relief.

VII

Under the allegations of the bill, the tax complained of is a privilege tax laid on the sale, storage and/or distribution of gasoline and is laid alike on all those who sell, store or distribute the same, and since the complainant falls within the class taxed by the act—that is, the complainant under the allegations of the bill is a storer and/or a distributor—and is not discriminated against, the complainant cannot be heard to complain in this case.

VIII

Because under the allegations of the bill, the complainant stores gasoline in the State of Tennessee within the purview of the statutes and the tax in question is laid on the storage of gasoline and the complainant is therefore liable for the same.

IX

Because under the allegations of the bill, the complainant distributes gasoline in the State of Tennessee within the purview of the statutes and the tax in question is laid on [fol. 62] the distribution of gasoline and the complainant is therefore liable for the same.

X

Because, the fact, if it be a fact as alleged in the bill, that the complainant pays total taxes of all kinds and character to the State and to its political subdivisions grossly in excess of those paid by motor vehicle carriers, does not invalidate the tax in question as applied to the complainant, because under the allegations of the bill, the tax in question is a privilege tax laid on the privilege which the complainant enjoys of exercising certain privileges in the state, namely; the privilege of storing and/or distributing

gasoline, and being a privilege tax must only be equal, uniform and applied to all alike within the class taxed. Complainant therefore cannot complain that as regards the total tax aggregate which it pays to the State and its various subdivisions, said total is excessive as compared with its competitor motor vehicle carriers.

XI

Because the ultimate use to which the gasoline purchased by the complainant and shipped into Tennessee is put, cannot and does not determine the right of the State to tax the same or to tax the privilege of handling the same, because the criterion by which the right of the State is to be judged [fol. 63] is not the intention of the purchaser but the status of the property at the time of the transaction or when the state undertakes to impose the tax.

Wherefore Defendants move the Court to sustain the foregoing demurrer and dismiss complainant's bill.

L. D. Smith, Attorney General. Roy H. Beeler, Solicitor General.

[fol. 64] In Chancery Court of Davidson County

Nashville, Chattanooga & St. Louis Ry.

vs.

Roy C. Wallace, Comptroller, et al.

Decree of November 11, 1931

Be it remembered that this cause came on to be, and was, this day heard before Chancellor R. B. C. Howell, upon the original bill as amended and the demurrer of the defendants, Roy C. Wallace, Charles M. McCabe and L. D. Smith, in their official capacities, and after argument of counsel and due consideration thereof, the Chancellor was of opinion that grounds one to five inclusive of the demurrer are not well taken and are accordingly disallowed and overruled. The Chancellor was of opinion that grounds six to eleven inclusive of the demurrer are all well taken and each and every one of them are accordingly sustained.

It was therefore ordered, adjudged and decreed by the Court that the bill as amended be and the same is hereby dismissed, and that the defendants have and recover of the Nashville, Chattanooga & St. Louis Railway and of its sureties on its cost bond, Fitzgerald Hall and Seth M. Walker, all costs of this cause, for which execution may issue.

To the foregoing action of the Court in sustaining grounds six to eleven inclusive of said demurrer, and to [fol. 65] the action of the Court in sustaining each one of said grounds to the demurrer, complainant, Nashville, Chattanooga and St. Louis Railway excepted and prayed an appeal therefrom to the present term of the Supreme Court of Tennessee, sitting at Nashville, which appeal is by the Chancellor granted upon condition that complainant execute and file with the Clerk and Master a good and solvent appeal bond in the penal sum of $250.00 conditioned as prescribed by law in such cases, within thirty days from the entry of this decree.

To the action of the Chancellor in overruling grounds one to five inclusive of said demurrer, and to the action of the Court in not sustaining each and every one of said grounds one to five, inclusive, defendants excepted and prayed an appeal therefrom to the present term of the Supreme Court, which appeal is granted without the necessity of executing an appeal bond, as is provided by law in such cases.

Approved for entry.

Fitzgerald Hall, Roy H. Beeler.

[fols. 66 & 67] Bond on appeal for $250.00, approved and filed November 11, 1931, omitted in printing.

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 21, 1932

To the Clerk of the Supreme Court of the State of Tennessee:

You are hereby requested by appellant, The Nashville, Chattanooga & St. Louis Railway, to incorporate in the transcript of record in the above styled case to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause upon petition of The Nashville, Chattanooga & St. Louis Railway, the following:

1. Petition for appeal with endorsement thereon.
2. Assignment of errors accompan-ing petition for appeal.
3. Appeal bond with endorsement thereon.
4. Order allowing appeal.
5. Citation with acknowledgment of service thereon.
6. Assignment of errors filed by appellant, The Nashville, Chattanooga & St. Louis Railway in the Supreme Court of Tennessee.
7. Opinion of the Supreme Court of Tennessee dated April 30, 1932.
8. Petition filed by appellant, The Nashville, Chattanooga & St. Louis Railway on May 4, 1932 for a re-hearing in the Supreme Court of Tennessee.
9. Opinion of the Supreme Court of Tennessee dated June 4, 1932.

[fol. 70] 10. Final order in this cause in the Supreme Court of Tennessee.

11. Transcript of record.
12. This præcipe.
13. The Clerk's certificate.

The Nashville, Chattanooga & St. Louis Railway, by Fitzgerald Hall, Vice-President & General Counsel.

I, Roy H. Beeler, counsel for appellees and Solicitor General of the State of Tennessee, acknowledge service of

this præcipe on this June 21st, 1932. I agree that it embraces all that need be transmitted from the Supreme Court of the State of Tennessee to the Supreme Court of the United States in this cause.

Roy H. Beeler, Counsel for Appellees and Solicitor General of the State of Tennessee.

[fol. 71] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 72] Judge's certificate to clerk omitted in printing.

[fol. 73] Clerk's certificate to judge omitted in printing.

[fol. 74] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June 24, 1932

Comes now The Nashville, Chattanooga & St. Louis Railway, appellant in the above styled cause, conformably to Rule 13 of this Honorable Court, and adopts its assignment of errors as its statement of the points to be relied upon.

And The Nashville, Chattanooga & St. Louis Railway, appellant, further states that all the record as filed in this cause should be printed, including this statement.

The Nashville, Chattanooga & St. Louis Railway, by Fitzgerald Hall, Vice-President & General Counsel.

I, Roy H. Beeler, counsel for appellees in this cause and Solicitor General of the State of Tennessee, acknowledge service of the above on this the 21st day of June, 1932, and I concur in the suggestion that the entire record be printed for consideration in the Supreme Court of the United States.

Roy H. Beeler, Counsel for Appellees and Solicitor General of the State of Tennessee.

[fol. 75] [File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 36,873. Tennessee, Supreme Court. Term No. 176. The Nashville, Chattanooga & St. Louis Railway, appellant, vs. Roy C. Wallace, Comptroller of the Treasury of the State of Tennessee, et al., etc. Filed June 24, 1932. File No. 36,873.